

<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUES**

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective January 24, 2018; and (2) whether appellant has met his burden of proof to establish continuing disability or residuals on or after January 24, 2018.

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>4</sup> The facts and circumstances as set forth in the Board's prior order are incorporated herein by reference. The relevant facts are as follows.

On May 20, 1997 appellant, then a 51-year-old distribution clerk, filed an occupational disease claim (Form CA-2) alleging that he injured his shoulders and left finger due to factors of his federal employment. OWCP accepted the claim for right shoulder adhesive capsulitis, bilateral rotator cuff sprain/strain, left brachial neuritis or radiculitis, and left trigger finger. It paid appellant wage-loss compensation on the supplemental rolls, commencing November 5, 2003, and on the periodic rolls, commencing July 3, 2011.

Appellant underwent authorized surgeries for left trigger thumb release on February 27, 1997; left ulnar nerve transposition on October 8, 1997; left shoulder arthroscopy and rotator cuff repair on January 25, 1998; right shoulder arthroscopy on November 5, 2003; right shoulder examination under anesthesia on May 30, 2004; and repair of a right rotator cuff tear on September 22, 2010.<sup>5</sup>

In reports dated August 15, 2016 and June 12, 2017, appellant's attending physician, Dr. Stephen Sladicka, a Board-certified orthopedic surgeon, noted his history of injury beginning on May 19, 1997 and listed the accepted conditions including right shoulder adhesive capsulitis, right brachial neuritis, radiculitis, sprain of the left shoulder, upper arm, left trigger finger, and bilateral rotator cuff injuries. He noted that appellant had difficulty lifting with pain in his right shoulder. Dr. Sladicka also described his date-of-injury position and found that he was permanently totally disabled due to his accepted conditions.

On July 6, 2017 OWCP referred appellant, along with a statement of accepted facts (SOAF) and a series of questions to Dr. Joseph Estwanik, a Board-certified orthopedic surgeon, for a second opinion examination and evaluation.

In a July 28, 2017 report, Dr. Estwanik discussed appellant's factual and medical history and reported the findings of his physical examination. He found that his trigger finger symptoms had resolved, but that he continued to have residual loss of motion of his shoulders. Dr. Estwanik determined that appellant required no further medical treatment for the accepted conditions. He opined that he exhibited multiple concurrent non-work-related disabilities. Dr. Estwanik found that appellant was totally disabled from work.

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<sup>4</sup> *Order Remanding Case*, Docket No. 20-0142 (issued September 29, 2020).

<sup>5</sup> On August 10, 2000 OWCP granted appellant a schedule award for 25 percent permanent impairment of his left arm. On January 11, 2005 it granted an additional schedule award for 13 percent permanent impairment of his right upper extremity.

On August 10, 2017 OWCP requested a supplemental report from Dr. Estwanik to clarify his opinion on the issue of appellant's employment-related residuals and disability.

In an August 23, 2017 supplemental report, Dr. Estwanik opined that appellant's right shoulder adhesive capsulitis had resolved, and referred to his prior report. He further opined that he had excellent internal and external rotation, but his restricted efforts at forward flexion and abduction supported a finding of full range of motion (ROM) of the right shoulder without adhesions. Dr. Estwanik determined that appellant had attempted to demonstrate loss of ROM. He further found that, while appellant was totally disabled from work due to non-employment-related conditions, he was capable of full-duty work based only on his accepted employment injuries.

In a notice dated December 15, 2017, OWCP advised appellant that it proposed to terminate his wage-loss compensation and medical benefits because he no longer had residuals or disability causally related to his accepted employment-related conditions. It found that the weight of the medical evidence rested with Dr. Estwanik, who found that he had no objective findings to support further ongoing disability or residuals caused by his employment-related conditions. OWCP afforded appellant 30 days to submit evidence challenging the proposed termination action. No response was received.

By decision dated January 24, 2018, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective that date.

On February 7, 2018 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on July 10, 2018.

Following the oral hearing, appellant provided additional evidence, including an April 17, 2018 report from Ian Welliver, a physician assistant.

Appellant underwent a right shoulder magnetic resonance imaging (MRI) scan on May 16, 2018, which demonstrated severe hypertrophic AC joint changes, possible tears of the anterior supraspinatus, and infraspinatus tendons and labrum tears.

In a July 27, 2018 note, Dr. Carey McKain, a Board-certified orthopedic surgeon, found marked loss of ROM of the shoulders with a positive Speed test bilaterally. He reviewed diagnostic studies and found deteriorated rotator cuffs on both sides with multiple partial tearings, significant arthrosis, and severe arthritis with spurs in both acromioclavicular (AC) joints.

By decision dated September 17, 2018, the hearing representative affirmed OWCP's January 24, 2018 termination decision.

On August 11, 2015 Dr. Michael P. Bunch, a Board-certified orthopedic surgeon, noted that appellant's shoulder pain did not improve with epidural spinal injections.

On April 18, 2019 appellant, through counsel, requested reconsideration. Counsel provided a series of notes dated September 13, 2017 through May 16, 2018 from nurse practitioners.

In treatment notes dated November 21, 2016 through February 26, 2018, Dr. David L. Cabral, an internist, noted appellant's history of repetitive motion injuries to the shoulders and left elbow at work and resultant surgeries. He reviewed his bilateral shoulder x-rays and found AC joint osteophytosis. Dr. Cabral also reported left elbow calcific tendinopathy.

In an undated narrative report, Dr. Karyn Weston Rahn, Board-certified in occupational medicine, noted reviewing appellant's history of work-related injuries of his bilateral shoulders and his medical history. She described his job duties and current bilateral shoulder symptoms. On physical examination Dr. Rahn found that appellant gave full and reasonable effort. She found no atrophy in appellant's right shoulder, but tenderness over the AC joint, subacromial region, supraspinatus and infraspinatus capsule with limited ROM and decreased strength. Dr. Rahn reported positive Speed's and active compression test, positive Hawkins, Neer, and infraspinatus tests. She found that appellant continued to have significant impairments of the left and right shoulders, which were directly related to his work duties. Dr. Rahn explained using his shoulders repetitively hundreds of times a day to throw, sort, and carry mail resulted in significant damage to the bilateral shoulder joints and surrounding tissues including rotator cuff and labral tears. She found that appellant was totally disabled from work due to his accepted bilateral shoulder conditions and required bilateral shoulder replacements. Dr. Rahn further explained her disagreement with Dr. Estwanik's findings and conclusions regarding appellant's adhesive capsulitis.

By decision dated July 2, 2019, OWCP denied modification of its prior decisions.

Appellant appealed to the Board. By order dated September 29, 2020, the Board directed OWCP to review the additional medical evidence in support of the April 18, 2019 reconsideration request, including new medical reports dated November 2016 to February 2018 by Dr. Cabral and issue a *de novo* decision.<sup>6</sup>

By decision dated February 26, 2021, OWCP again denied modification of its prior decisions.

### **LEGAL PRECEDENT -- ISSUE 1**

Once OWCP has accepted a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's benefits.<sup>7</sup> The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.<sup>8</sup> To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.<sup>9</sup> OWCP's

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<sup>6</sup> *Id.*

<sup>7</sup> *L.L.*, Docket No. 18-1426 (issued April 5, 2019); *C.C.*, Docket No. 17-1158 (issued November 20, 2018); *I.J.*, 59 ECAB 408 (2008); *Vivien L. Minor*, 37 ECAB 541 (1986).

<sup>8</sup> *A.G.*, Docket No. 19-0220 (issued August 1, 2019); *A.P.*, Docket No. 08-1822 (issued August 5, 2009); *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *Furman G. Peake*, 41 ECAB 361, 364 (1990).

<sup>9</sup> *See A.G., id.*; *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002).

burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>10</sup>

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.<sup>11</sup> For a conflict to arise, the opposing physicians' opinions must be of virtually equal weight and rationale.<sup>12</sup> In situations where the case is properly referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>13</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective January 24, 2018.

Dr. Estwanik noted in his July 28 and August 23, 2017 reports that appellant had no objective signs of right shoulder adhesive capsulitis, left trigger finger, bilateral rotator cuff sprain/strain, and left brachial neuritis or radiculitis. He concluded that appellant had no disability or need for further medical treatment due to the accepted employment-related conditions. Dr. Estwanik further concluded that appellant was totally disabled from work due to nonemployment-related conditions.

On June 12, 2017 Dr. Sladicka noted appellant's history of injury on May 19, 1997 and listed the accepted conditions including right shoulder adhesive capsulitis, right brachial neuritis, radiculitis, sprain of the left shoulder, upper arm, left trigger finger, and bilateral rotator cuff injuries and found that he was totally disabled.

As Dr. Estwanik concluded that appellant was able to resume his date-of-injury position without restrictions and Dr. Sladicka concluded that he remained totally disabled for work, there is an unresolved conflict in the medical evidence. OWCP should have resolved the conflict of medical opinion evidence before terminating compensation.<sup>14</sup> As it failed to resolve the conflict of medical opinion evidence, the Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective January 24, 2018.

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<sup>10</sup> See *M.C.*, Docket No. 20-1396 (issued November 22, 2021); *R.P.*, Docket No. 17-1133 (issued January 18, 2018).

<sup>11</sup> 5 U.S.C. § 8123(a); see *E.L.*, Docket No. 20-0944 (issued August 30, 2021); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

<sup>12</sup> *M.C.*, *supra* note 10; *P.R.*, Docket No. 18-0022 (issued April 9, 2018).

<sup>13</sup> See *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

<sup>14</sup> *M.C.*, *supra* note 10; *K.L.*, Docket No. 19-0729 (issued November 6, 2019); *P.P.*, Docket No. 17-0023 (issued June 4, 2018).

**CONCLUSION**

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective January 24, 2018.<sup>15</sup>

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 26, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 15, 2022  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>15</sup> In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.